# Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-2275 OF 2010
LEE SWEE SENG JC
30 JANUARY 2013

*Contract — Formation — No agreement on material terms reached — Parties not agreed on contract sum for project — Whether concluded contract had not come into being — Whether plaintiff barred from claiming payment for pre-contract engineering works done for failure to be registered under Registration of Engineers Act 1967*

The first defendant, a Vietnam-based company, had awarded the plaintiff a project to design, install, complete and commission a landfill gas extraction and flaring system at a landfill in Vietnam. Prior to the award the plaintiff, at the first defendant's request, had carried out various pre-contract engineering works for the project for which it had invoiced the first defendant in the sum of RM264,330.50. The first defendant had never disputed the invoiced amount prior to the trial. Before the first defendant could instruct the plaintiff to commence work on the project the first defendant was acquired by the France-based second defendant company which also owned the third defendant. The second and third defendants were the plaintiff's business competitors. Following the take-over the first defendant informed the plaintiff that it no longer required the plaintiff to carry out the project as the second defendant would undertake it instead. The plaintiff sued the defendants, inter alia, for payment of the RM264,330.50 for the pre-contract works, US$215,345.16 as the plaintiff's agreed profit margin under the letter of award and damages against the second and third defendants for procuring and inducing the first defendant to breach its contract with the plaintiff. The trial did not involve the second defendant as it had then just been served with the writ and statement of claim out of jurisdiction. Inter alia, the first defendant contended that as the plaintiff was not registered under the Registration of Engineers Act 1967 ('REA') its claims were not maintainable.

**Held,** allowing the claim for RM264,330.50 only against the first defendant with interest and costs and dismissing all other claims against the first and third defendants with costs:

(1) The plaintiff had proved its claim for the pre-contract engineering works against the first defendant on balance of probabilities. The first defendant was estopped from denying the debt owed to the plaintiff as well as from challenging the quantum claimed (see para 19).

(2) The plaintiff was not required to be registered under REA as it did not provide professional engineering services nor was it an engineering consultancy practice as defined under REA. REA was inapplicable to the circumstances and facts of the instant dispute (see para 50).

(3) Save for agreement on the margin of profits under cl 1.1 of the letter of award there was no agreement on the contract sum and consequently there was no valid, binding and enforceable contract between the first defendant and the plaintiff. As there was no concluded contract and hence no breach by the first defendant, the third defendant as a corollary could not be held liable for the same claim under the tort of inducement of breach of contract (see paras 72–73).

(4) The decision not to pay for the pre-contract engineering works and not to negotiate further towards signing a FIDIC Contract for the project was distinctly the first defendant's. There was no evidence the third defendant as a third party outsider had induced the breach of contract (see para 87).

**[Bahasa Malaysia summary**

Defendan pertama, sebuah syarikat yang berasal daripada Vietnam, telah mengawardkan plaintif sebuah projek untuk mereka, memasang, menyiapkan dan mentauliahkan pengekstrakan gas tapak pelupusan dan sistem pembakaran pada tapak pelupusan di Vietnam. Sebelum award, atas permintaan defendan pertama, plaintif telah menjalankan kerja-kerja kejuruteraan pra-kontrak untuk projek-projek di mana defendan pertama diinvois plaintif dengan jumlah RM264,330.50. Defendan pertama tidak pernah mempertikaikan jumlah invois sebelum perbicaraan. Sebelum defendan pertama mengarahkan plaintif untuk memulakan kerja ke atas projek tersebut, defendan pertama telah diambil alih oleh syarikat defendan kedua yang berasal daripada Perancis, yang juga turut dimiliki oleh defendan ketiga. Defendan kedua dan ketiga merupakan pesaing-pesaing perniagaan plaintif. Berikutan pengambilalihan, defendan pertama memaklumkan plaintif bahawa defendan tidak lagi memerlukan plaintif untuk menjalankan projek tersebut memandangkan defendan kedua yang sebaliknya akan menjalankannya. Plaintif menyaman defendan-defendan, antara lainnya, untuk bayaran RM264,330.50 untuk kerja-kerja pra-kontrak, US$215,345.16 sebagai margin keuntungan yang dipersetujui plaintif di dalam surat award dan ganti rugi terhadap defendan kedua dan ketiga kerana mendapatkan dan mendorong defendan pertama melanggar kontraknya dengan plaintif. Perbicaraan tidak melibatkan defendan kedua memandangkan defendan kedua baru sahaja diserahkan dengan writ dan pernyataan tuntutan di luar bidang kuasa. Antara lainnya, defendan pertama menghujah bahawa memandangkan plaintif tidak berdaftar di bawah Akta Pendaftaran Jurutera 1967 ('APJ'), tuntutannya tidak boleh dikekalkan.

**Diputuskan,** membenarkan tuntutan hanya untuk RM264,330.50 terhadap defendan pertama dengan faedah dan kos dan menolak semua tuntutan terhadap defendan pertama dan ketiga dengan kos:

(1) Plaintif telah membuktikan tuntutannya untuk kerja-kerja kejuruteraan pra-kontrak terhadap defendan pertama atas imbangan kebarangkalian. Defendan pertama diestop daripada menafikan hutang yang terhutang kepada plaintif dan juga daripada mencabar kuantum yang dituntut (lihat perenggan 19).

(2) Plaintif tidak perlu mendaftar di bawah APJ memandangkan ia tidak menyediakan perkhidmatan kejuruteraan profesional mahupun merupakan sebuah amalan perundingan kejuruteraan seperti yang ditakrif di bawah APJ. APJ tidak terpakai kepada keadaan dan fakta pertikaian ini (lihat perenggan 50).

(3) Selain perjanjian mengenai margin keuntungan di bawah klausa 1.1 surat award, tiada perjanjian mengenai jumlah kontrak dan akibatnya, tiada kontrak sah, mengikat dan boleh dikuatkuasakan di antara defendan pertama dan plaintif. Memandangkan tiada kontrak dimeterai dan dengan itu tiada pelanggaran oleh defendan pertama, secara kesimpulannya defendan ketiga tidak boleh dianggap bertanggungjawab bagi tuntutan yang sama di bawah tort dorongan pelanggaran kontrak (lihat perenggan 72–73).

(4) Keputusan untuk tidak membayar kerja-kerja kejuruteraan pra-kontrak dan untuk tidak berunding lebih lanjut ke arah menandatangani kontrak FIDIC bagi projek tersebut jelas dilakukan oleh defendan pertama. Tiada keterangan defendan ketiga sebagai pihak luar ketiga yang mendorong pelanggaran kontrak (lihat perenggan 87).]

**Notes**

For a case on no agreement on material terms reached, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) para 4406.

**Cases referred to**

*Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177, KBD (refd)

*Bousted Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, FC (refd)

*Co-Operative Central Bank Ltd (In Receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 4 CLJ 300, FC (refd)

*Courtney and Fairbain Ltd v Tolaini Brothers (Hotels) Ltd and Anor* [1975] 1 All ER 716, CA (refd)

*DHN Food Distributors Ltd and others v London Borough of Tower Hamlets* [1976] 3 All ER 462 (refd)

*Imperial Oil Ltd v C&G Holdings Ltd* (1990) 62 DLR (4th) 261 (refd)

*John B Skilling & Ors v Consolidated Hotels Ltd* [1979] 2 MLJ 2, CA (distd)

*Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 1 MLJ 673; [2000] 2 CLJ 132, CA (refd)
*Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; [1984] 2 CLJ 88, FC (refd)
*Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)
*Luxor Holdings Sdn Bhd v Hainal-Konyi (M) Sdn Bhd* [2006] 3 MLJ 727, CA (distd)
*Menaka v Lum Kum Chum* [1977] 1 MLJ 91, PC (refd)
*Ng Siew San v Menaka* [1973] 2 MLJ 154, FC (refd)
*Orix Factoring Malaysia Sdn Bhd v E-Furnishings International Sdn Bhd & Ors* [2010] 9 MLJ 65, HC (refd)
*Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, HC (refd)
*Raymond Banham & Anor v Consolidated Hotels Limited* [1976] 1 MLJ 5 (distd)
*Said v Butt* [1920] 3 KB 497, KBD (refd)
*Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414, CA (distd)
*Shaw (John) & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, CA (refd)
*Smith, Stone and Knight Ltd v Lord Mayor, Aldermen & Citizens of the City of Birmingham* [1939] 4 All ER 116, KBD (distd)
*Stocznia Gdanska SA v Latvian Shipping Co (No 3)* [2002] 2 Lloyd's Rep 436, CA (refd)
*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, FC (refd)
*Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor* [2012] 1 MLJ 585, CA (refd)

**Legislation referred to**

Contracts Act 1950 s 66
Professional Engineers Act [SG] ss 18, 19
Registration of Engineers Act 1967 s 7A

*Celine Chelladurai (Oommen Kurien with her) (Zaid Ibrahim & Co) for the plaintiff.*
*Wong Hin Loong (Karen Ng Gek Suan with him) (Azman Davidson & Co) for the first defendant.*
*Conrad Young (Leong Phaik Leng with him) (Sreenevasan Young) for the third defendant.*

**Lee Swee Seng JC:**

**[1]** When parties said that a certain document containing terms and conditions that parties have agreed upon shall form a binding contract between them while awaiting another more formal contract to be entered into, is there

a binding contract that has come into existence, that would entitle the non-defaulting party to sue if finally the formal contract was not entered into? Was it more a case of a contract to enter into another contract or was it a concluded contract for all intent and purpose and that the formalised contract was a mere formality and it was as good as having been executed by the parties? How wonderful it would be if one can actually 'see' the meeting of minds when there is one? When the physical evidence as in a duly executed document is lacking, one would have to delve into the metaphysical and to determine from what has transpired in the exchange of correspondence, the constraining circumstance and the conduct of the parties whether a contract has come into being.

THE PARTIES

**[2]** The plaintiff's main business lies in the field of landfill gas and biogas extraction and utilisation. The first defendant is a private limited company incorporated in Vietnam. Its primary business is in biogas capture and waste treatment services for the Nam Son Landfill, Hanoi, Vietnam. The second defendant is a public limited company incorporated in France. It is primarily involved in renewable energy sector and specialises in landfill biogas valorisation. The second defendant is the ultimate holding/parent company of the first defendant. The third defendant's primary business is in the production of renewable energies and the reduction of greenhouse gases. It is a wholly owned subsidiary of the second defendant and the second defendant operates its business in the region through the third defendant. The plaintiff contended that the second defendant and/or the third defendant have the management and control of the first defendant. This web of relationship within the defendants assumes greater significance from the plaintiff's perspective when it mounted the tort of inducement for breach of contract against the second and third defendants for inducing the first defendant to breach its contract with the plaintiff. Admittedly the plaintiff and the second and third defendants are competitors in the industry.

PROBLEM

**[3]** To begin with there was a letter of award dated 1 June 2009 by the first defendant to the plaintiff. The first defendant awarded to the plaintiff a project referred to as 'Design, Installation, Completion and Commissioning of Landfill Gas Extraction and Flaring System for All Cells at Nam Son Landfill, Hanoi, Vietnam' ('the project'). There was also referred to the Project Costing Calculation for the project ('Rev 13') dated 25 May 2009 forming the basis of the contract sum. The plaintiff now says that the Project Costing Calculation for the project should be Rev 14 dated 1 June 2009 instead of Rev 13 dated

25 May 2009 and that it was a typographical error. More shall be said of this so-called 'typographical error' later in this judgment.

**[4]** During the period from November 2007–October 2009 the plaintiff undertook various works for the project at the first defendant's request. Five invoices were issued totalling RM264,330.50. These were for what the plaintiff termed as pre-contract engineering works and the first defendant had not raised any issue with these invoices at all material times.

**[5]** The plaintiff was anxious to commence work in accordance with the letter of award. However the first defendant was unable to instruct the plaintiff to commence work ostensibly because of various bureaucratic obstacles to overcome and approvals to be obtained before construction work could be commenced.

**[6]** The waiting turned to worrying and the delay to distress for the plaintiff when it read a public announcement dated 16 February 2010 by the second defendant that it had acquired the first defendant. The press release went on to state that the Vietnamese authorities had approved the project and that the commissioning of the first phase of the project is planned in the third quarter of 2010.

**[7]** Having clinched the contract and waiting only for the commencement of the project works upon the execution of the FIDIC contract, or so the plaintiff thought, this would appear like the first defendant pulling the carpet from beneath its feet. Not wanting to sound too alarming, the plaintiff wrote to the first defendant as if nothing had happened and cautiously expressing their concern that the first defendant had not called on it to commence construction of the project. The plaintiff also gently reminded the first defendant of the payments outstanding for the invoices issued for the pre-contract engineering works.

**[8]** The plaintiff's worst fear was confirmed when the first defendant's representative, Dato' Lee Peng Joo, called for a meeting with the plaintiff's representative and informed the plaintiff that the first defendant would be undertaking the project with the second defendant. At the meeting was Mr Pascal Voisin who handed his business card to the representative of the plaintiff. His card disclosed that he was a director of the third defendant.

**[9]** Being prevented from commencing the construction of the project the plaintiff commenced this claim in court against all the defendants for what it believed to be a breach of a concluded contract contained in the letter of award and also against the second and third defendants for damages for procuring and

inducing breach of contract by the first defendant.

THE PRAYERS

**[10]** The plaintiff claims against all the defendants as follows:

(a) the sum of US$215,345.16 as the plaintiff's agreed profit margin under the letter of award;

(b) the sum of RM264,330.50 for works done on the project in respect of the pre-contract engineering expenses for the period November 2007–October 2009;

(c) interest upon the sum of USD215,345.16 at the rate of 8%pa from the date of filing until the date of full and final realisation of the same;

(d) interest upon the sum of RM264,330.50 at the rate of 8%pa from the date of filing until the date of full and final realisation of the same;

(e) damages for procuring and inducing breach of contract as against the second and third defendants;

(f) interest upon prayer (e) above, at the rate of 8%pa from the date of filing until the date of full and final realisation of the same; and

(g) costs.

**[11]** This trial did not involve the second defendant for it had then just been served with the writ and statement of claim out of jurisdiction in Paris and had filed an application to set aside the service of the writ and statement of claim.

THE PRINCIPLES

*The plaintiff's claim against the first and third defendants for the sum of RM264,330.50 being the pre-contract engineering works as stated in the invoices sent to the first defendant*

**[12]** During the period from November 2007–October 2009, at the request of the first defendant, the plaintiff undertook various works (pre-contract engineering expenses) for the project, for which the following invoices were issued:

| INVOICE NO | DATE | AMMOUNT (RM) |
|---|---|---|
| QIV0048 (ref: bundle D at pp 140–141) | 10 June 2009 | RM175,512.74 |
| QIV0055 (ref: bundle D at p 142) | 30 June 2009 | RM45,868.45 |
| QIV0057 (ref: bundle D at p 143) | 8 September 2009 | RM37,578.05 |
| QIV006 (ref: bundle D at p 144) | 23 October 2009 | RM989.16 |

| | | |
|---|---|---|
| QIV0062 (ref: bundle D at p 145) | 23 October 2009 | RM2,258.16 |
| QIV0067 (ref: bundle D at p 146) | 16 November 2009 | RM2,123.9 |
| | Total | RM264,330.50 |

**[13]** I agree with the plaintiff's submission that at the material time when the aforesaid invoices were issued, the first defendant did not raise any issue whatsoever to the same. The first defendant had failed to settle in full the sums invoiced by the plaintiff. Therefore, the first defendant had breached cll 9.1, 9.2 and Appendix 1, cl 12.6 of the letter of award. In fact by various e-mails correspondence first defendant had indicated to the plaintiff that they would be paying but they were waiting for payments to come in from the Vietnamese corporation.

**[14]** In brief the plaintiff undertook the following works as summarised by learned counsel for the plaintiff Miss Celine Chelladurai:

(a) assessing the project's feasibility by means of site investigations, conducting interviews with the local operator, collection of data, and conducting desktop calculations;

(b) preliminary design work for submission to the URENCO;

(c) detailed design work and the specification of the type of equipment and instruments to be used;

(d) sourcing, identifying, discussing and assessing potential subcontractors and suppliers located in Vietnam, China, Malaysia and Europe for the works to be done and materials to be supplied for the project;

(e) attending meetings with the first defendant to update the URENCO on the status of the project and to explain the design of the project;

(f) conducting detailed calculations on the investment costs and projected CER credit returns; and

(g) organising project reference visits to the plaintiff's project in Malaysia for the officials of the URENCO, at the request of the first defendant.

**[15]** Indeed during the examination-in-chief of Dato' Lee Peng Joo (ref DWS1 at pp 12–13) the first defendant's witness also confirmed that the following works were done by the plaintiff:

> Q11: Please refer to pages 98 to 107 of the First Defendant's bundle of documents ('FDBOD') and explain to the Court the nature of this document?
>
> A21: These are preliminary conceptual or typical shop drawings submitted by the plaintiff to the first defendant. These drawings are numbered as

VN07-002 to VN07-011 respectively. They consist of preliminary conceptual drawings for —

(1) Preliminary layout of gas extraction wells & pipes and pumping & regulating unit with flare (VN07-001) (page 98 of FDBOD);

(2) Typical connection from well head to gas main collection pipe & typical pipe laying (VN07-003) (page 99 of FDBOD);

(3) Typical connection of condensate trap (manual discharge type) from gas main collection pipe (VN07-004) (page 100 of FDBOD);

(4) HDPE well head top flange (VN07-005) (page101 of FDBOD);

(5) Detailed dimensions of HDPE perforated pipe, OD 125mm PN10 (VN-006) (page 102 of FDBOD);

(6) Proposed vertical gas extraction well layout (VN07-007) (page 103 of FDBOD);

(7) Isometric illustration of proposed well head connection (VN07-008) (page 104 of FDBOD);

(8) Layout of concrete foundation for containerised blower & flare system (VN07-009) (page 105 of FDBOD);

(9) Proposed layout for containerised blower & flare system (VN07-010) (page 106 of FDBOD);

(10) Proposed layout for vertical gas extraction well (VN07-011) (page 107 of FDBOD).

…

**[16]** It is pertinent to note that at the material time when the aforesaid invoices and the corresponding supporting documentation were issued to the first defendant, the first defendant did not raise any issue whatsoever on the aforesaid invoices nor did the first defendant challenge the plaintiff's timesheets, receipts and vouchers (ref bundle G at pp 3–103) in support of its claim thereto.

**[17]** I am in full agreement with the plaintiff's position that the first defendant had admitted liability to the aforesaid invoices but gave various excuses to defer payment of the same. This is a case where action and inaction speaks louder than words and where contemporaneous correspondence belies and contradicts the first defendant's current contention that it was disputing the invoices and the work done. Miss Celine for the plaintiff had highlighted the following with which I am in full agreement:

(a) in an email dated 29 July 2009, the first defendant apologised for the delay in paying the plaintiff's invoice as the first defendant's bank was requesting for further documentation prior to releasing payment. The

first defendant had advised the plaintiff that such payment would be made by the week of 12 August 2009 (ref bundle D at pp 149–150);

(b) in an email dated 29 August 2009, the first defendant stated that it hoped to resolve the issue of the 'GURA (Gas Use Rights Agreement)' at a meeting in Hanoi, Vietnam on 1 September 2009 and to clear all requirements for funds to be released to the first defendant. Thereafter the first defendant would pay all sums due to the plaintiff by September 2009 (ref bundle D at pp 151–155);

(c) in an email dated 10 September 2009, the first defendant explained that because of documentation issues with the Vietnamese authorities, the release of funds,to the first defendant was delayed. Thus, payments of the plaintiff's invoices were also delayed. In response thereto, the plaintiff requested the first defendant to clarify or explain the connection between the aforesaid documentation issues and release of funds as the plaintiff was under the impression that the first defendant had already secured the funds (ref bundle D at pp 156–159); and

(d) in an e-mail dated 2 October 2009, the first defendant's representative (Dato' Lee Peng Joo DW1) stated that although the first defendant's funding had been approved in principle, there were various condition precedents of the bank to be fulfilled prior to a drawdown and some important documents from Vietnam are required. In this regard, it was hoped such obstacles would be cleared by the end of October 2009 and immediately thereafter, the plaintiff's payments would be released (ref bundle D at pp 156–159).

**[18]** Likewise the first defendant's contention that its refusal to pay was because of excessive charges and the lack of certification from its own staff appears rather contrived and hollow. The following answers given by Dato' Lee Peng Joo during the cross-examination by Miss Celine (ref notes of evidence at pp 433–449), speak for itself:

| | |
|---|---|
| CCD | And still at those pages, but we'll first go to the emails which appear at page 140, to the invoices, at 140 to 146 Bundle D. You received these invoices? |
| LEE | Yes, by email, yes. |
| CCD | Yes and have you received the documents that appear at Bundle G page 3 to 103? |
| | … |
| LEE | Part of it. Only the summary. Not the timesheet, the breakdown info, the invoice, not that one. It's only the summary claim. |
| CCD | Only the Summary of Claim. YA Bundle G. |

CCD Ok. Do you agree that prior to the meeting on 18.03.2010, you had never asked the plaintiff to justify the invoices that appear at pages 140 t 146 of Bundle D?

LEE From what period to what period, again?

CCD From the date of issuing the invoices until 18th March when the meeting was held, during that period you'd never asked the plaintiff to provide the justification or supporting documents for these invoices?

LEE Yes.

CCD Yes? And do you agree that this is despite the plaintiff stating in their letters that they would be happy to clarify their invoices if necessary? For example at pages 147 and 148. when the emails were sent.

LEE Yes, I received this Summary of Claim.

CCD No, my question Dato' Lee, is that you did not ask them to justify any of the invoices in the period when they were issued until 18th March 2010, despite the fact that the plaintiff in their emails had said they would be happy to clarify any of the invoices that they had sent to you? Do you agree with that statement?

LEE Yes, agree.

…

CCD Now we go to an email dated 20.07.2009 at page 155. Now this is an email from Frans to yourself and it says, 'Dear Dato' Lee, it is quite a while ago since we have heard from you and actually also from URENCO and Entech. Has the project completely stopped or what is happening? We can't do anything before we get some feedback. At our last meeting in K.L, you promised to issue a cheque for the outstanding payment to Q2 Engineering. We have still not received anything. Looking forward to your reply.' Now at this point of time on the 20.07.2009, what payments or what invoices had the plaintiff issued to the first defendant?

LEE The pre-engineering contract work.

CCD The pre engineering contractors. So when he refers to 'you promised to issue a cheque for the outstanding payment' this would refer to the pre contract engineering works? Do you agree? In this e mail?

LEE Yes.

…

CCD Ok. My question to you is when you say that the bank is requesting for more documentation before releasing payment, it relates to your arrangement with the financier.

LEE Yes.

CCD To release your financing?

LEE Yes.

CCD So the reason why you have given why you have not paid this progress

payment or the pre-engineering contract works is because your bank has not released the funds to you. Do you agree?

LEE Partly, partly.

CCD In this sentence.

LEE Yes, partly.

CCD It doesn't say partly, Dato' Lee, it says.

LEE No, I mean the reason is partly due to this.

CCD In this email this is the only reason you've provided. Do you agree?

LEE Yes.

CCD Yes. And you estimate that you would get things cleared by the 12th of August. Do you agree that what you are saying here is that, by the 12th of August you hope to make payment. Do you agree?

LEE Yes.

…

CCD Dato' Lee, look at page 152. The 2nd last sentence on that email from Low. 'We would really appreciate it if you could …' No, the top paragraph. 'We would like to know if this has been resolved or if there's any documentation required from us'. You don't respond to any of that. You say 'for fund to be released and pay all due to you by this September. Do you agree that's what you said?

LEE Yes. But bear in mind the certification for the payment never came out because my men are checking on the details. So I'm waiting for them to come out.

CCD Ok, the certification that you speak of. Where is it?

LEE Because not issue.

CCD Where's this process?

LEE That's why I was trying to tell you if you refer back to my page 130, all the pre-engineering contract. If normal contract we don't pay, most of the clients do not pay for pre-contract engineering. But this case is a very special. We on out of goodwill we know that they have done some work and we agreed to pay them and it's only on the cost. But their pre-contract engineering claim according to my man feedback is all with the profit and excessive claim from your resubmission from 266 to 199.

LEE Ok, that's what you are saying.

CCD It was over claimed excessively so.

CCD Where is the evidence of that? Did you communicate that to the plaintiff?

LEE My man was checking trying to verify where is over claim or whether it's justified the claim.

CCD You agreed with me?

LEE So we didn't communicate.

CCD Dato' Lee?

LEE Yes?

CCD You agreed with me earlier that despite requests for clarification et cetera, you never asked for any of this? Do you agree?

LEE Yes, we never asked because my man was working on it.

CCD Yes. And even until the meeting on 18th March which is a period of approximately 9 months, you never got back even on the 1st invoice, do you agree?

LEE Yes.

CCD And even when you were asked for payment from the period of July until September, you did not say we are checking, until we verify we cannot make payment. You never said anything like that, do you agree?

LEE Never say.

CCD In fact all you said is, 'project financing documentation not in place. Once that is through I will pay you'. Do you agree?

LEE Yes.

…

CCD My question is where in the letter of award does it say that the pre-contract engineering works or the works done prior to the contract would be the subject of certification? You used the word 'certification'.

LEE I have down here 9.2 in certification upon submission of relevant time sheet, receipt, vouchers and invoice et cetera. This is what I mentioned here.

CCD Yes. Not certification.

LEE Yes.

CCD The supporting documents.

LEE Of course with this submission my man will have to come up with the certification.

CCD Yes.

LEE Certificate before payment.

…

CCD I don't agree with you on the certification but we will come back to that. I'm asking you now, in all those emails from June till 2.10.2009, nowhere did you mention a certification process. Do you agree?

LEE Yes.

CCD Nowhere did you say that my men are checking. Once we are happy with it we will release the payment.

LEE Yes.

CCD Do you agree?

LEE Yes.

CCD In fact you say, you use words like 'immediately'. Do you agree?

LEE Yes.

…

CCD Until today, Dato' Lee, has the first defendant paid anything to the plaintiff?

LEE No.

**[19]** The conduct of a reasonable businessman in receipt of the invoices would be to respond by putting in writing at least once in the various correspondences on this subject the fact that the first defendant was disputing the amount invoices as being excessive or that its men will still in the process of verifying or certifying the plaintiff's claims. I would agree with the plaintiff and to go so far as saying that the first defendant is estopped from denying the debt owed to the plaintiff as well as challenging the quantum claimed by the plaintiff. See the case of *Orix Factoring Malaysia Sdn Bhd v E-Furnishings International Sdn Bhd & Ors* [2010] 9 MLJ 65. The factual matrix as set out attracts the application of the principle of estoppel as enunciated by His Lordship Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Bousted Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, as follows:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v Alt* (1878) 8 Ch D 286 at p 314:
>
> > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

**[20]** I have no hesitation in finding that the plaintiff had more than proved this claim for pre-engineering works on a balance of probability and I allowed the plaintiff's claim against the first defendant with costs.

*Whether the pre-contract engineering works are caught under the Registration of Engineers Act 1967 and the plaintiff not being registered under the Act, the plaintiff's claim is illegal, null and void and unenforceable*

**[21]** The Registration of Engineers Act 1967 ('REA') is to provide for the registration of engineers, sole proprietorships, partnerships and bodies corporate providing professional engineering services (see the preamble to the REA).

**[22]** The relevant sections are set out below:

> Section 2 Interpretation
>
> In this Act unless the context otherwise requires —
>
> …
>
> 'Engineering consultancy practice' means a sole proprietorship, partnership or body corporate, providing professional engineering services, registered under section 7A or 7B;
>
> …
>
> 'Graduate Engineer' means a person registered under subsection 10(1);
>
> …
>
> 'Professional Engineer' means a person registered under subsection 10(2);
>
> 'professional engineering services' means engineering services and advice in connection with any feasibility study, planning, survey, design, construction, commissioning, operation, maintenance and management of engineering works or projects and includes any other engineering services approved by the Board;
>
> Whilst the Registration of Engineers Act 1967 provides definitions for various terms it does not provide a definition for the term 'engineer' or the term 'engineering' nor is it known what the precise scope of the term 'professional engineering services.

**[23]** The plaintiff has not held itself out as an engineering consultancy practice. The plaintiff's primary nature of business lies in the field of landfill gas and biogas extraction and utilisation. The plaintiff has referred to itself in all public documents as a technological solutions provider wherein based on the plaintiff's experience and expertise in this area, the plaintiff provides the methodology and equipment to realise environmental projects.

**[24]** In any event, I agree that the first defendant has failed to substantiate its contention that the plaintiff is an 'Engineering consultancy practice' or that it provides 'professional engineering services' by calling an independent expert

witness on the issue. It is trite that he who asserts must prove *'ei qui affirmat non ei qui negat incumbit probation'* and the first defendant has failed to do so in this regard.

**[25]** The works that were carried out by the plaintiff in respect of the plaintiff's claim for pre-contract engineering expenses primarily involved the conceptual design of the project (ref bundle F at pp 98–107); and the proposed methodology and equipment for the project. It is predominantly and primarily preliminary in nature and at most peripheral to professional engineering services. It is conceptual and not concrete, cursory at best and certainly did not continue to construction. Neither did it condescend to anything close to the core and critical component of civil engineering works. Little wonder that all the conceptual drawings provided by the plaintiff were all specifically marked as 'NOT FOR CONSTRUCTION'. These works were done for the benefit of the first defendant to enable the first defendant to satisfy and explain the same to Hanoi URENCO and to obtain the necessary approvals. In the course of the plaintiff's work, the plaintiff will of course utilise the services of a professional engineer and/or an engineering consultancy practice to endorse the final designs, drawings and calculations to be in line with the local laws and regulations of place of execution of the project ie Vietnam.

**[26]** Pursuant to cl 3.1 of the letter of award, it was envisaged that prior to commencement of construction of the project, the plaintiff and the first defendant would enter into the FIDIC Conditions of Contract for Design Build & Turnkey, which would govern the rights, obligations and responsibilities of parties in respect of execution of the project. Whilst the letter of award is governed by Malaysian Law, the proposed FIDIC Conditions of Contract for Design Build & Turnkey would have been governed by Vietnamese Law as Vietnam was the place of execution of the project.

**[27]** The letter of award itself contemplates the carrying out of the civil works as a stage distinct and different from the preliminary and pre-contract conceptual works. For the former the plaintiff would have utilise the services of a professional engineer and/or an engineering consultancy practice in Vietnam and this is evident and indeed envisaged in cl 1.2 of the letter of award (ref bundle D at p 129) which specifically states as follows:

> *That the Civil Works including supply and installation of wells, piping and all connections, all foundations and cabins are not part of this Contract*, but you are to ensure that *the appointed civil works sub contractor* to carry out the works to your design drawings, material specification, and top quality standard to ensure the designed gas recovery quantity is achieved with tolerance acceptable as per Estimated CER table attached, which is based on information provided by Urenco Hanoi/Entech. This CER table which shall serve as a guide. (Emphasis added.)

**[28]** Further, the Project Costing Calculation allows for the cost of appointment of Vietnamese professional engineers for the project under the heading 'Item 1. Salary: Consultancy'.

**[29]** It is undisputed, that at all material times, the plaintiff's dealings with the first defendant was through Dato' Lee Peng Joo ('DW1') who is the general director & 'legal representative' of the first defendant. Dato' Lee Peng Joo is a fellow member of the Institution of Engineers, Malaysia; a member of the Institute of Electrical Engineers, UK; a member of the Malaysian Institute of Corporate Governance (MICG); a professional engineer registered with the Board of Engineers, Malaysia; and a chartered engineer registered with the Council of Engineers, UK. The plaintiff submitted and with reasonable rationale that it is against this backdrop of knowledge and qualifications of the main protagonist in the instant dispute, that the first defendant claims to have appointed the plaintiff under an unenforceable and illegal contract vis a vis the letter of award.

**[30]** I do not think this ever crossed the mind of the first defendant when the letter of award was issued. Indeed it was raised for the first time only in the first defendant's opposition to the plaintiff's application for summary judgment in the affidavit in reply of DW1 affirmed on 9 July 2012 and later in its amended defence filed on 14 August 2012 raising for the first time in its pleading the contention of non-registration of the plaintiff under the REA and raising the defence of illegality and unenforceability and as being against public policy.

**[31]** I take the view that courts must appraise itself of the fact that in an increasingly globalised world where national barriers and boundaries are being blurred and where technology has transformed the work professional work is being done in a borderless world, regard must be had to promote transfer of technology and expertise in fields where the pool of knowledge and expertise is universal and not parochial. Whilst regard should be had to the readiness of the profession to be globally competitive and to open its market gradually to foreign input in this region, unless the execution of the engineering works as in the construction as expressly prohibited without first registration under the REA, anything conceptual and preliminary should not be caught as that would restrict and restrain the free flow of ideas and conceptual work which by its nature is universal in its application. Such a preliminary conceptual work can indeed be done anywhere in the world and the drawings and findings be emailed to the client in Malaysia!

**[32]** I take into consideration the fact that the project is a clean development mechanism ('CDM') undertaking as defined under the Kyoto Protocol. As

pointed out by Miss Celine for the plaintiff, the CDM was designed to meet the following dual objective:

(a) to help developed countries fulfil their commitments to reduce emissions; and

(b) to assist developing countries in achieving sustainable development.

**[33]** The CDM allows emission-reduction projects in developing countries to earn certified emission reduction ('CER') credits and these CER credits can be traded and sold, and used by industrialised countries to a meet a part of their emission reduction targets under the Kyoto Protocol (ref bundle D at p 246 & 246 (article 12 of the Kyoto Protocol).

**[34]** Article 4.1 of the United Nations Framework Convention on Climate Change ('UNFCC') requires all parties to promote and cooperate in the development, application and diffusion, including transfer of greenhouse gasses mitigation technologies (ref bundle D at pp 215–219).

**[35]** As pointed out by Miss Celine, one of the key benefits of the CDM is the transfer of technology and know-how not already available in the host country. The intergovernmental panel on Climate Change defines technology transfer 'as a broad set of processes covering the flows of know-how, experience and equipment for mitigating and adapting to climate change amongst different stakeholders such as governments, private sector entities, financial institutions, non-governmental organisation and research/education institutions'. This definition covers every relevant flow of hardware, software, information and knowledge between and within countries, from developed to developing countries and vice versa.

**[36]** In the UNFCC article entitled *The Contribution of the Clean Development Mechanism under the Kyoto Protocol To Technology Transfer*' (ref bundle E at pp 256–312) it is noted that 58% of the transferred technology for CDM originates from five countries — Germany, USA, Japan, Denmark and China and the leading suppliers of technology among developing countries are China, India, Chinese Taipei, Brazil and Malaysia. It this regard, it is worth bearing in mind that the plaintiff is a wholly owned subsidiary of Q2 A/S (a Danish incorporated company) and the technology employed by the plaintiff originates from/licensed by Q2 A/S.

**[37]** With the above in mind, the works for which the plaintiff was appointed pursuant to the letter of award concerned the setting up of a landfill gas collection and flaring system at the Nam Son Landfill, Hanoi. In this regard, the technology and equipment that were envisaged to be installed for

the purpose of the project included, inter alia, the following:

(a) a gas collection network, permeable pipes and vertical gas wells;

(b) an extraction and flaring station including high temperature enclosed flares; and

(c) monitoring and control systems.

**[38]** The first defendant asserts that the plaintiff is unable in law to enforce the letter of award or that the objects of letter of award is illegal, by virtue of the plaintiff's non-registration as a member of the board of engineers pursuant to the REA. That appears to be more reactionary and retrogressive and it is not suggested that the first defendant itself being the main contractor of the project is so registered.

**[39]** I do bear in mind the timely reminder drawn to my attention by Miss Celine that in interpreting the purpose of the REA I ought to be mindful of the effect which the interpretation may have on the commercial community and this is especially so in view of the objectives of UNFCC and the Kyoto Protocol (to which Malaysia is a signatory) in respect technology transfers and know-how of CDM projects. In this regard, His Lordship Edgar Joseph Jr FCJ in *Co-Operative Central Bank Ltd (In Receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 at p 328; [1995] 4 CLJ 300 at p 313 cautioned:

> a commercial judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community

**[40]** Similarly, His Lordship Edgar Joseph Jr FCJ in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 at p104; [1999] 2 CLJ 997 at pp 1015–1016 also opined:

> … we consider that the trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law

**[41]** In so far as the first defendant's contention is concerned with respect to the letter of award being unenforceable for non-compliance with the need for registration of the plaintiff under the REA, that can be easily dismissed. The REA does not have an extraterritorial effect and is only applicable to such persons providing professional engineering services within Malaysia. Consequently, the REA is inapplicable to the circumstances and facts of the instant dispute where the letter of award is concerned.

**[42]** In so far as the claim for pre-contract engineering work is concerned, I do not think the works are caught by the REA as they were of the nature of

preliminary conceptual drawings. There were no submissions made to any authorities yet. The cases referred to by Mr Wong for the first defendant can all be distinguished. In *John B Skilling & Ors v Consolidated Hotels Ltd* [1979] 2 MLJ 2, the appellants held themselves out as a 'firm of consultant engineers' and their agreement with the respondent was to render professional engineering services in respect of a construction of a hotel project in Singapore. The Singapore Court of Appeal held that as the appellant was not duly registered pursuant to ss 18–19 of the Professional Engineers Act, the court will not enforce the contract as by its own *lex fori* the contract is tainted with illegality.

**[43]** In *Luxor Holdings Sdn Bhd v Hainal-Konyi (M) Sdn Bhd* [2006] 3 MLJ 727, the appellant engaged the respondent as their consultant civil and structural engineer in respect of a project within jurisdiction (Malaysia). The contract was for a lump sum of RM410,000 for the scope of services under Part A Conditions of Engagement, Board of Engineers Malaysia. The appellant gave notice to the respondent to terminate the contract and also informed the respondent that the appellant wished to change their consultants. The appellant contended that the agreement between the appellant and the respondent was null and void because of illegality for contravention of the Registration of Engineers Act 1967. The Malaysian Court of Appeal, allowed the appeal, inter alia, because it was not disputed that the respondent was an international company and pursuant to s 7A of the Registration of Engineers Act 1967, PW1 (Hendra Wahjudi) who was the alter ego of the respondent was not allowed to be a shareholder or to hold office of a director in the respondent. Therefore, the agreement was illegal.

**[44]** I agree with Miss Celine that from the evidence adduced at trial that the plaintiff had not held itself out as providing professional engineering services nor as an engineering consultancy practice. This fact is further supported by reference to cl 1.2 of the letter of award which provides that the plaintiff would have to appoint a civil works subcontractor to carry out the works for the project. As with the facts of the case of *John B Skilling & Ors*, *Luxor Holdings Sdn Bhd* concerns a project that was to be carried out within jurisdiction and therefore the law relating to the registration of engineers was applicable. In this case, the project was to be executed in Vietnam and consequently, the applicable law in respect of the execution of the project would be Vietnamese law.

**[45]** In *Raymond Banham & Anor v Consolidated Hotels Limited* [1976] 1 MLJ 5, the plaintiffs who were partners of a firm of consulting Mechanical & Electrical Engineers practising in Hong Kong, rendered professional services pursuant to a contract in respect of the project (Hotel Sheraton in Singapore) owned by the defendants. The plaintiffs claimed for the value of work

completed and the defendants contended that the contract was illegal and unenforceable because the plaintiffs were not registered as required by the Professional Engineers Act. The Singaporean High Court held; (1) that the plaintiff were engaged in professional engineering work in Singapore even though the drawing of plans was carried out in Hong Kong; (2) an overseas professional engineer who undertakes employment as such in Singapore even in respect of one isolated project as this one would be contravening the provisions of s 18 of the Professional Engineers Act and should he fail to register himself unless he engages in such employment under the direction or supervision of a registered professional engineer; (3) services performed by the plaintiffs under the contract were therefore illegal; (4) the plaintiffs' claim was therefore unenforceable notwithstanding the defendants' own participation in the illegal contract.

**[46]** I agree with Miss Celine that the main point in *Raymond Banham & Anor* was the fact that the plaintiffs were consulting Mechanical & Electrical Engineers practising in Hong Kong and rendered professional services pursuant to a contract in respect of the project in Singapore. This is not the case in respect of the plaintiff's claim herein. It can be argued from the decision of Winslow J in *Raymond Banham & Anor* that the plaintiff could have engaged in such an employment under the direction or supervision of a registered professional engineer in Singapore. As with the plaintiff's claim herein, such would have been done pursuant to cl 1.2 of the letter of award.

**[47]** In *Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414 pursuant to a consultancy services agreement dated 26 October 1984, the appellant was contracted by the respondent to provide in Malaysia comprehensive architectural, engineering and quantity surveying consultancy services for the design and supervision of the construction, building and erection of the new state mosque. The appellant appealed against the decision of the High Court setting aside an arbitration award on the basis that the appellant was not an 'architect', 'engineer' or 'quantity surveyor' as defined in the respective Acts and as a result thereof, could not provide the consultancy services and therefore did not have a cause of action based on contract. The Malaysian Court of Appeal held that s 7A of the respective Acts clearly provide that only a body corporate which has a permit from the relevant governing professional bodies can recover 'in any court any fee, charge or remuneration for any professional advice or services'. The appellant were not registered nor approved to practise the disciplines covered by the Acts.

**[48]** Further, the Court of Appeal in *Sami Mousawi-Utama Sdn Bhd* held that the award by the arbitrators therefore was clearly against then statutory provisions and the public policy which the enactment of such laws aim to

achieve — to regulate the professions involved and to protect the public from unqualified and unregistered engineers, architects or quantity surveyors. A

**[49]** In *Sami Mousawi-Utama Sdn Bhd* the appellant was contracted to provide services for the design and supervision of the construction, building and erection of a mosque in Malaysia and because the respective Acts required the appellant to be registered it was not only contravention of the respective Acts but against also public policy. B

**[50]** In respect of the plaintiff's claim herein, the plaintiff is neither required to be registered pursuant to the Registration of Engineers Act 1967 as it does not provide professional engineering services nor is it an engineering consultancy practice as defined under the Registration of Engineers Act 1967. Further, since the project was to be executed in Vietnam the public policy reasoning does not apply. C D

**[51]** All the above cited cases concern registration of a professional (architect, engineer or quantity surveyor) who were carrying out works within the jurisdiction wherein the claim was brought. Rightly, such claims could not be enforced because they contravened the local laws of the respective jurisdictions. E

**[52]** I agree with the plaintiff's submission that it may only be required to register itself pursuant to Registration of Engineers Act 1967 (on the assumption that it provides professional engineering services and is an engineering consultancy practice) if the project was executed in Malaysia but such is not the case. F

**[53]** Even if it were caught I hold that this is a fit case for the application of s 66 of the Contracts Act 1950 where both parties were not in *pari delicto* and more so when Dato' Lee Peng Joo is a qualified engineer himself representing the first defendant. If it is a case where he had already known that it was unlawful and illegal to have entered into such a contract for pre-engineering work then it is plainly a case where the first defendant can take advantage and profit from its own wrong doing. However here was more a case where registration or rather non-registration under the REA was never an issue and it never crossed the minds of the parties at least where the pre-engineering works are concerned. As regards the civil engineering works, that is to be during the construction stage which construction will be in Vietnam and hence the issue of registration under the REA does not arise. Arising from the first defendant's amendment of its defence to plead breach of the REA by the plaintiff, the plaintiff had amended in its amended reply to the first defendant's amended defence to include a claim under s 66 of the Contracts Act 1950. G H I

**[54]** This area of law on the circumstance under which s 66 of the Contracts

Act 1950 would be brought to play was expounded with clarity by His Lordship Azmi LP in *Ng Siew San v Menaka* [1973] 2 MLJ 154 as follows:

> The next question is whether s 66 of our Contracts Ordinance applies. I have already set out the grounds upon which counsel for Ng argued before us that s 66 could not apply to this case. In deciding this question in favour of Menaka the learned judge made two findings of fact namely, both parties were not aware of the illegality at the time of the execution of the documents and it was only discovered when the statement of defence was filed. Counsel for Ng argued before us that there was evidence upon which the court could come to the conclusion that Ng was not aware of the illegality until later because Ng himself swore to that fact before the learned trial judge. On the other hand, there was no evidence to show that Menaka or Manickam were equally ignorant. In my opinion the question of knowledge is a question of fact which the trial judge was entitled to draw from the circumstances of the case. The man who could come and give evidence on behalf of Menaka is Manickam Chettiar who is now unfortunately dead. In my view the transaction in question was an open and honest transaction. The relevant documents were prepared by a solicitor who appeared to be so concerned with complying with the provisions of the Land Code that he overlooked the provisions of s 8 of the Moneylenders Ordinance. It is obvious from the facts of the case that Menaka would have gained nothing from all this. I would therefore with respect support the learned judge's finding that neither Menaka nor Manickam Chettiar was aware of the illegality at the time of the execution of the documents.
>
> As to the effect of s 66, the learned trial judge cited the following passage from the judgment of Chandra Reddy CJ In *Kanuri Sivaramakrishnaiah v Vemuri Venkata Narahari Rao* AIR [1960] And Pra 186 at p 188.
>
> > It is manifest that in order to invoke this action, the invalidity of the contract or agreement should be discovered subsequent to the making of it. *This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, ie without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal.*
>
> *The effect of s 65, (s 66 of the Malayan Contracts Ordinance) is that, in such a situation, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the status quo ante.* (Emphasis added.)

See also *Menaka v Lum Kum Chum* [1977] 1 MLJ 91.

**[55]** I would thus dismiss this line of argument by the first defendant and I reaffirm the plaintiff's claim against the first defendant for pre-contract engineering work for RM264,330.50 with interest of 5%pa from date of writ with costs from D1.

*The plaintiff's claim for loss of profit of USD215,345.16 arising out of the breach of the letter of award by the first defendant*

**[56]** Whether or not the plaintiff can make the above claim would be dependent on whether the letter of award is a concluded contract where the project is concerned such that the failure of the parties to sign the formal and more detailed contract in the FIDIC form is immaterial and that it was as if and as good as the FIDIC contract has been signed.

**[57]** I agree with learned counsel for the first defendant Mr Wong Hin Loong that what had been agreed upon was the profit margin for the various heads of costs in what is commonly referred to as a costs plus contract. The various margins referred to should the FIDIC contract be entered into are as follows as set out in the letter of award in cll 1.1 and 1.3 which provides as follows:

> The acceptance of this Contract is subject to the following terms and conditions:-
>
> 1.0 CONTRACT SUM
>
> 1.1 The Contract Sum or Design, Installation, Completion and Commissioning of the above mentioned project shall be based on the actual cost of the Works plus an agreed margin. The Contract Sum and agreed profit margins for each section of the Works shall be derived as follows:

| Item. | Description of Works. | Contract Sum |
|---|---|---|
| 1. | Engineering and salary expenses. | Cost of Works + 100% Margin |
| 2. | General Expenses. | Cost of Works + 1% Margin |
| 3. | Pumping and Regulating Unit. | Cost of Works + 26% Margin |
| 4. | Electrical and Scada Unit | Cost of Works + 26% Margin |

> …
>
> *1.3 Your revised quotation reference dated 25-5-09 shall form the basis of estimated quantity and rate* … You are to resubmit the quotation price based on % margin as stated in item 1.1 above, and the Fairyland equipment capacity sizing shall be stated clearly in quotation. (Emphasis added.)

**[58]** The nature of a cost plus or cost reimbursement contract is such that the basis of payment is established at the time of contracting and the contractor is accordingly reimbursed the prime cost of the work that he carries out plus a fee to cover his overheads and profits. In contrast to a lump sum contract there is no definite sum that is stipulated to be the contract sum.

**[59]** The particular type of cost reimbursement contract that the letter of award represents is a cost plus percentage fee contract. As the name suggests,

the contractor is paid the actual cost or the prime cost for the work done plus a fixed percentage being predetermined and stipulated in the contract. The learned authors of *Keating on Building Contracts* (7th Ed), at pp 100–101 explain:

> Cost plus percentage contracts. Such contracts sometimes contain an elaborate description of the method of calculating the cost. Where they do not and there is a simple agreement to pay a percentage upon the cost of labour and materials, 'cost' means, it is submitted, the actual cost honestly and properly expended in carrying out the works. The contractor is not, it is submitted, disentitled from such cost merely because it exceeds what was anticipated. But it is thought that there would normally be an implied term that the contractor would carry out the works with reasonable economy so that expenditure in excess of what was reasonable would be irrevocable. It would be a question of fact and degree in each case. A formally drafted cost plus contract will usually have a clause intended to protect an employer against waste or extravagance on the part of the contractor.

**[60]** As can be appreciated from the above explanation, what is the valid and reasonable costs that will be incurred might well be a sore point of contention unless parties have agreed. Further there can be no agreement on costs until scope of work and the design and drawings are finalised by the parties. I see merits in the first defendant's contention that for a contract such as this to be valid and enforceable, it is not sufficient that that the margin of profits are agreed upon. In *Courtney and Fairbain Ltd v Tolaini Brothers (Hotels) Ltd and Anor* [1975] 1 All ER 716, which is similar to this case, only the margin of 5% of profit had been agreed upon. The Court of Appeal held that there could be no binding and enforceable contract unless the price had been agreed or there was an agreed method of ascertaining the price which was not dependent on negotiations between the parties. As Lord Denning MR clearly and crisply put it at p 719:

> Now the price in a building contract is of fundamental importance. It is so essential a term that there is no contract unless the price is agreed or there is an agreed method of ascertaining it, not dependent on the negotiations of the two parties themselves. In a building contract both parties must know at the outset, before the work is started, what the price is to be, or, at all events, what agreed estimates are. No builder and no employer would ever dream of entering into a building contract for over £200,000 without there being an estimate of the costs and an agreed means of ascertaining the price.

**[61]** Clearly what we have here is at best a case where the plaintiff was very close to clinching the contract but the contract itself had not been inked. Important terms were being negotiated but nothing was nailed save for the profit margin. However one may look at the context and the circumstance, it cannot be denied that no price, contract sum and/or estimates had been agreed save for the margin of profits under cl 1.1 of the letter of award.

**[62]** Under cross-examination by the third defendant's counsel ('D3C') Mr Conrad Young, PW1 has accepted that no contract sum is stated in the letter of award.

D3C: In the letter of award, I think you already agreed or rather confirmed to my learned friend Mr Wong, that there is no contract sum in any amount stated in the letter of award.

PW1: Yes. Notes of Evidence, Volume 1 at page 232.

**[63]** I agree that the method of ascertaining the price was dependent on negotiations between the parties. In this respect, the first defendant will need to negotiate/agree on the final design to be built based on detailed engineering drawings and the actual BQ showing the actual costs. This was in fact admitted by PW1 under cross-examination by the first defendant's counsel ('D1C'):

D1C: Now would you agree with me that these detailed engineering drawings are actually required by both parties to prepare the Bill of Quantities?

PW1: Yes, for the actual Bill of Quantities. Notes of Evidence, Volume 1 at page 87, Q&A 127.

**[64]** With regard to Revision 14, it is clear that that Revision 14 had not been agreed by the parties as submitted above and was never a part of the letter of award. Here I have to dismiss the plaintiff's assertion made for the first time at trial that the letter of award had a typographical in referring to Revision 13 by reference to its date when it should have been a reference to the date of Revision 14. It was clear that Revision 13 had not been agreed as the first defendant had proposed some changes to the profit margin and as for Revision 14, there was no evidence that the parties had agreed on it. If indeed it was a typographical error, why was it not realised earlier and corrected by way of correspondence between the parties instead of being raised for the first time during trial? The syntax of the sentence itself in cl 1.3 does not support such a contention as the reference was to '… resubmit the quotation price based on % margin as stated in item 1.1 above, …' Why the need to 'resubmit' if the reference was to an agreed quotation in Revision 14? The language would be strained and skewed resulting in an artificial and awkward rendering of the sentence.

**[65]** Consequently, the alleged contract sum (sales price of USD781,290.80) in Revision 14 had not been agreed upon and remained as a general estimate/quotation of price of the project submitted to the first defendant by the plaintiff for negotiation/consideration.

**[66]** I agree with Mr Wong for the first defendant that this general estimate had not been agreed upon as the components for the actual costs/works could not been finalised/established until the design/detailed design of the project

has been finalised and/or agreed upon. The employer of the project (in this case, the first defendant) need to agree on design to be built before parties can agree on the contract sum.

**[67]** The testimony of DW1 is both relevant and revealing:

(Q12: ) Was this new estimated costing calculation sheet for the Project (Revision 14) backdated to 1.6.2009 agreed by the plaintiff and first defendant?

(A12: ) *No, it was not agreed upon as Revision 14 has not been finalised as the final design/detailed design of the Project has not been finalised and/or agreed upon*. The contract price is to be calculated based on 'actual cost of the work plus a profit margin as agreed'. This is also known as a 'cost-plus contract' or 'costs-reimbursable contract'. *The parties cannot establish or finalise the actual costs of work or rather, the contract sum until the final design or the Project has been agreed upon*. This is the norm for 'design and build contracts' which the plaintiff and first defendant are contemplating to enter into. *The employer of the project (in this case, the first defendant) needs to agree on design to be built before the establishing and agreeing on the contract sum*.

(Q13: ) Why wasn't Revision 14 or rather the contract sum finalised and agreed between both parties?

(A13: ) Like I explained earlier, the contract sum was not finalised and agreed between both parties for this Project as *the plaintiff had failed to provide the first defendant the detailed engineering drawings for construction. The detailed engineering drawings were required by both parties to prepare the Bills of Quantities*. The Bills of Quantities is a document used in the construction industry which materials, parts and labour (and their costs) are itemised. It is to be used to enable the plaintiff to price for the work for the Project. *Since the actual costs of works for the Project (which will form the basis for the contract sum) had not been established/agreed upon, there is no contract between both parties*. This is a 'cost-plus contract' or 'costs-reimbursable contract' that the plaintiff and the first defendant was supposed to agree upon. Under this arrangement, the plaintiff is reimbursed for the actual cost of labour and materials plus a percentage of the total costs for overhead and profit …' DWS-1, page 10, Q&A 12 and 13. (Emphasis added.)

**[68]** The plaintiff's witness, PW1 admitted that such detailed drawings were not provided for this purpose:

D1C: Now would you agree with that in the present case here the plaintiff has not provided the First Defendant detailed engineering drawings for construction? What we have seen just now is the conceptual drawing which is stamped 'Not For Construction'. *So my question now is would you agree that the plaintiff has not provided the First Defendant the detailed engineering drawings for construction for the project in Vietnam?*

PW1: *Yes*. Notes of Evidence, Volume 1 at page 87, Q & A 126 (Emphasis added.)

**[69]** As per Lord Denning in *Courtney and Fairbain Ltd v Tolaini Brothers (Hotels) Ltd and Anor* at p 720:

> … I think we must apply the general principle that *when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.* (Emphasis added)

**[70]** What can be fairly and firmly said was that the parties were at an advanced stage of negotiation. Nothing clinched yet though parties were close to concluding the contract. Nothing nailed yet though parties were negotiating towards a closure. Sometimes the picture becomes clearer by asking the question in reverse. Had the plaintiff decided to call off further negotiation because a far bigger project came by, could the first defendant sue the plaintiff based on the fact that the parties had agreed on the profit margin in a costs plus contract? I do not think so simply because the contract price was still being negotiated and had not been finalised yet. Perhaps what could be said was that during the period of negotiation the parties had tacitly agreed to negotiate with no other but either party could call off or discontinue the negotiation or discussion designed to narrow the issues. It does not matter here that the first defendant's real reason was that having being taken over by a competitor in Bionersis SA, it is now obliged to continue the project with their new partner or shareholder. The important question was whether there was a concluded contract or not. If there was not, then it does not matter if the first defendant should decide to go solo or together with someone else in the entity of the second or third defendants. In fact it is stated that under cl 3.1 of the letter of award that a FIDIC contract with amendments where necessary is contemplated to be entered into. Until that is done for a contract of this magnitude in a foreign jurisdiction, one cannot say that merely because the margin of profit has been agreed then a concluded contract has been entered into bearing in mind that the base contract price in a cost-plus contract was still very much being negotiated depending on the scope of work that has finally to be undertaken by the first defendant for the Vietnamese state corporation.

**[71]** Based on the foregoing, I am more than persuaded by Mr Wong Hin Loong for the first plaintiff that there is no agreement on the contract sum, and consequently, there is no valid, binding and enforceable contract between the first defendant and the plaintiff. I had thus dismissed the plaintiff's claim of USD215,345.16 against the first defendant with costs.

**[72]** It follows that as there has been no concluded contract and hence no

breach by the first defendant, the third defendant as a corollary cannot be held liable for the same claim under the tort of inducement for breach of contract.

**[73]** Even if there has been a concluded contract, which is not the finding of this court, the plaintiff has not proved its claim for the damages sought. No evidence has been led to show that everything had been mobilised including the staff and the purchase of the equipment and the machinery. What at all was lost was merely a loss of opportunity. But to prove that the plaintiff would have to show that there were no other works that they could do during that period or that they had turned down other projects because of this project. The plaintiff in claiming damages has to strictly prove it and that it has mitigated its loss. This the plaintiff has failed to do. Under the relentless cross-examination of PW1 by Mr Wong for the first defendant in respect of the source documentation from which the figures in the project costing calculation sheet were derived from, it was reluctantly admitted that the plaintiff had not produced a scrap of source documents or evidence to support those figures, which is a glaring omission following from the dicta of His Lordship Edgar Joseph Jr J (as he then was) in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360. The source document from which the project costing calculation sheet is derived is crucial and critical as without that the so-called base costs before the profit margin factor, is just a figure plucked from the air. At p 367 His Lordship observed as follows:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* (1825) 2 C&P 109; 172 ER 50 and *Twyman v Knowles* 138 ER 1183. On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at p 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one-man-business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given (see para 345 *McGregor on Damages* (15th Ed)).
>
> …

*Now, it was alleged by the plaintiffs that both the oral testimony of the accountant Mr So (regarding their financial operations) and the statement P76 prepared by him, were based upon the results of his examination of the accounts books of the plaintiffs for the relevant period. However, the accounts books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all. In my opinion, the result of this glaring omission, was to render such oral evidence of Mr So and P76 inadmissible in evidence and it makes not the slightest difference that Mr and Mrs Segal confirmed the accuracy of P76*. I take the law on this point to be correctly stated by the Vice-Chancellor in *Johnson v Kershaw* 63 ER 1059. In that case, the evidence of an accountant was tendered containing the results of his examination of certain partnership books, but the accounts books themselves upon which he based his statement were not in evidence. The Vice-Chancellor said:

> If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr Peet as to their contents.

That case commended itself to Dixon J (as he then was) in *Potts v Miller* (1940) 64 CLR 282 at p 303.

Nor, does it make any difference that counsel for the defendants never called for production of the accounts books, since the defendants never agreed to dispense with formal and proper proof of the loss of profits (see *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25 at p 30). (Emphasis added.)

**[74]** *Popular Industries* was cited with approval by the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777. The Federal Court emphasise the need for a plaintiff to prove its loss in this wise: 'In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 at p 178:

> … plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; *it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: This is what I have lost, I ask you to give me these damages*'. They have to prove it … (Emphasis added.)

*The plaintiff's claim for RM264,330.50 for pre-contract engineering works and for damages for inducement for breach of contract by the third defendant*

**[75]** The plaintiff is also saying that this claim can be validly made against the third defendant for inducement for breach of contract. Generally the basic principle is that only parties to a contract may sue each other and hence non-parties may not sue or be sued. Understandably there is a general initial inertia of the courts to find non-parties liable under a breach of contract unless its liability is under the tort of inducing breach of the contract.

**[76]** There is an exception to it in a case of the tort of inducement for breach of contract. Put it simply, knowingly for a third party to procure or, as it is often said, to induce a party to a contract to break the contract to the damage of the other contracting party without reasonable justification or excuse is a tort.

**[77]** As pointed out by Miss Celine for the plaintiff, the law regarding the tort of inducement for breach of contract has been stated by the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; [1984] 2 CLJ 88 and restated by the Court of Appeal in *Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 1 MLJ 673; [2000] 2 CLJ 132.

**[78]** She proceeded in her submission to summarise the elements of the tort in this wise. The Federal Court in *Loh Holdings Sdn Bhd*'s case and the Court of Appeal in *Kelang Pembena Kereta-Kereta Sdn Bhd*'s case, have stated that it constitutes a tort for third persons (such as the third defendant here) to deliberately interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled, which are as follows:

(1) There must be direct or indirect interference, coupled with the use of unlawful means;

(2) The tortfeasor must be shown to have knowledge of the relevant contract;

(3) The tortfeasor must be shown to have the intent to interfere;

(4) The claimant must show that it has suffered special damages, that is, more than nominal damages; and

(5) So far as it is necessary, the claimant must successfully rebut any defence based on justification which the defendant may put forward.

If these five conditions are fulfilled and the tortfeasor is shown to have had that intention to interfere with the relevant contract which is necessary to constitute the tort, it is quite irrelevant that it may have acted in good faith and without malice or under a mistaken understanding as to his legal rights; good faith, as such, provides no defence whatever to a claim based on this tort.

**[79]** To build up the plaintiff's cause of action under this tort, Miss Celine sought to show that the Bionersis Group of Companies was the controlling mind of the first defendant. She relied on what is axiomatic of board structure and control of companies arising from the concept of controlling shareholders. It is a generally accepted proposition of company law that the management of a company vests with the board of directors, which in theory, act as a collegiate body. In *Shaw (John) & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at p 134 Greer LJ aptly stated:

> A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

**[80]** Based on the above, she submitted that when the plaintiff pleaded that the third defendant is the company having management and control of the first defendant, the plaintiff is essentially stating that the third defendant has usurped the powers of the board of directors of the first defendant thereby managing and controlling the first defendant as if it were in fact the alter ego of the first defendant.

**[81]** To further bolster and buttress the plaintiff's claim she contended that Bionersis SA (the second defendant) and the third defendant operate as single economic unit. The concept of a group of companies operating as a single economic unit was first recognised in *DHN Food Distributors Ltd and others v London Borough of Tower Hamlets* [1976] 3 All ER 462 and recently applied by the Court of Appeal in *Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor* [2012] 1 MLJ 585.

**[82]** In *DHN Food Distributors Ltd*'s case, one company in the group owned the freehold and another company which carried on the business on the premises was a bare licensee. The English Court of Appeal was prepared to recognise the economic unit of the group as a single entity to enable them to recover their compensation. The different members of the English Court of Appeal seem to have been influenced by different factors. Denning MR referred to the fact that the subsidiaries were wholly owned. Goff LJ made it clear that not every group would be treated in this way but pointed to ownership, no separate business operations and the nature of the question to be answered. Shaw LJ pointed to common directors, shareholding and common interest. Denning MR in *DHN Food Distributors Ltd*'s case at p 467 remarked:

> Third, lifting the corporate veil. A further very interesting point was raised by Mr Dobry on company law. We all know that in many respects a group of companies is treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower, in *Modern Company Law* (3rd Ed), at p 216 says:

there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.

This is especially the case when a parent company owns all the shares of the subsidiaries — so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company DHN should be treated as that one.

**[83]** According to Miss Celine, though the third defendant asserts that it is not a shareholder of the first defendant but the said contention does not preclude the third defendant from being the controlling mind (either jointly with Bionersis SA or by itself) of first defendant. Even if Bionersis SA is the only controlling shareholder of the first defendant, this fact does not negate liability upon the third defendant as a tortfeasor if it assisted Bionersis SA in the tort complained by the plaintiff. However the plaintiff here is posturing too far and postulating possibilities of control of decision making process without proof of it. Even assuming for a moment that there is a certain amount of acting in accordance with a common aim or aspiration, that by itself is not interference or intervention from a third party outsider but more a consequence of coming under a common influence because of the corporate structure of both the first and third defendant that comes under the ultimate holding company of the second defendant. We bear in mind that we are not talking about wholly-owned subsidiaries but the first defendant who has at least two shareholders in PJ International Ltd and the second defendant. Parties incorporate separate joint-venture companies in their ventures overseas taking into consideration matters like political risk and financial risk and the need to contain any losses to the separately incorporated entity and to cushion any fall-out. Unless it is a case of fraud being perpetrated through a separately incorporated entity, the age-old principle of separate legal entity in that a company is separate from its directors and shareholders, should permeate all business dealings and prevail.

**[84]** Extrapolating the above, she expounded that even if Mr Pascal Voisin of the third defendant was merely a messenger of Bionersis SA, it does not preclude liability being established against the third defendant for the simple reason that the third defendant should have known or knew that inducing the first defendant to break its contract vis a vis the letter of award, with the plaintiff without reasonable justification or excuse is a tort.

**[85]** She underscored the fact that the third defendant is a wholly owned subsidiary of the Bionersis SA and the ultimate holding/parent company of the first defendant is Bionersis SA. She raised what I would call a hypothetical question: Is it then impossible for the third defendant to impose its will upon the first defendant? Her answer is surely not, because both Bionersis SA and the third defendant, can be said to operate as a single economic unit. She stressed that in fact, Mr Pascal Voisin had given evidence to the extent of stating the various local entities are merely conduits for the business of Bionersis SA (ref notes of proceedings at p 578).

**[86]** Here I must state that influence in decision making in a company like the first defendant where shareholders may confer with each other and come to a decision which they are convinced to be in the best interest of the company must not be equated with one shareholder inducing breach of a contract on the part of the company. The decision not to pay for the pre-contract engineering works done or not to negotiate further towards signing a FIDIC contract for the project, is at the end of the day distinctly that of the first defendant quite apart from whatever might have been the dynamics of the decision making process. At any rate there is no evidence of the third defendant as a third party outsider that had induced the breach. Were it not so, every time a wholly owned subsidiary or a subsidiary is being sued for breach of contract, the parent holding company will also be roped in because of its control over the way the decision was made by the subsidiary or wholly owned subsidiary. That would throw overboard the principle of separate legal entity. Unless there is fraud which would justify the piercing of the corporate veil, the veil remains intact and inviolable and that principle must be zealously upheld and its edifice guarded against any erosion by extrapolating decision of subsidiaries and equating it to the tort of inducement of breach of contract on the part of its parent holding company or its controlling shareholder.

**[87]** With respect, if she is capitalising on the concept of a single entity though variously separated subsidiaries and parent company, then bringing her argument to its logical conclusion, there is no third party interference as all are under the same umbrella. If she is stressing that there is nevertheless third party interference, then one must look at the concept of separate legal entities with respect to how each company being differently constituted makes its own decision. The third defendant is not a shareholder of the first defendant and so how can one say that the third defendant has interfered with what is ostensibly and obviously a decision by the first defendant not to pay the amount due under the pre-contract engineering works or the decision not to proceed to proceed to negotiate to conclusion into a FIDIC contract and hence a breach from the perspective of the plaintiff and the ensuing loss of profits.

**[88]** By the plaintiff's own pleaded case, the third defendant as the alleged

inducer, is not a third party to the contract between the plaintiff and the first defendant. Instead, the plaintiff says the third defendant is the controlling mind of the first defendant ie the third defendant is the first defendant. Mr Conrad Young respectfully submitted that this flaw in the plaintiff's pleaded case is fatal. With that I agree.

**[89]** Such an assault of the doctrine of separate legal entity can be seen in two cases brought to the attention of the court by Mr Conrad Young for the third defendant. They are the cases of *Said v Butt* [1920] 3 KB 497 and *Imperial Oil Ltd v C & G Holdings Ltd* (1990) 62 DLR (4th) 261.

**[90]** In *Said v Butt* [1920] 3 KB 497, the facts of the case are summarised in the headnotes, which reads as follows:

> The plaintiff desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious and unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend who bought the ticket at the theatre without disclosing that it was for the plaintiff. *By order of the defendant, the managing director of the theatre, the plaintiff was refused admission to the theatre on the night in question. The plaintiff claimed damages from the defendant for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre, alleged to have been made by them with the plaintiff by the sale of the ticket*. (Emphasis added.)

**[91]** In short, the plaintiff attempted to attach liability on the defendant as the managing director of the theatre in procuring the theatre to breach a contract with the plaintiff. The court, after finding that there was no contract between the plaintiff and the theatre, went on to consider the position if there was such a contract. McCardie J in refusing to attach such liability on the defendant held as follows at pp 504–506:

> *If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, upon the principle of Lumley v Gye, as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing.* This far-reaching result of the principle here suggested by the plaintiff is emphasised, when it is remembered that in an ordinary action for breach of contract the plaintiff recovers his pecuniary loss only; whereas in an action for wrongfully procuring a breach of contract the damages against the wrongdoer are at large, and may vastly exceed the sum recoverable in a mere claim for breach of contract against the contractor …
>
> Mr Disturnal for the plaintiff argued with great vigour that though the results may be remarkable, yet the principle asserted by the plaintiff is sound. He points out the breadth of the language employed in the well-known cases on the subject from

*Lumley v Gye* to the present time. I agree that the language is wide in its scope. The proposition is stated with unrestricted diction: that a person who without just cause knowingly procures a man to commit a breach of his contract with another, whereby the latter suffers pecuniary damage, is liable to an action for tort. But I conceive that none of the judges was thinking of such a case as the present. I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. If such a cause of action existed, I imagine that it would have been successfully asserted ere this. The explanation of the breadth of the language used in the decisions probably lies in the fact that *in every one of the sets of circumstances before the court the person who procured the breach of contract was in fact a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties.* If he is in the position of a stranger, he will be prima facie liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another …

*But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master.* His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments of Mr Disturnal on behalf of the plaintiff upon this point. To hold otherwise might create at least three actions whenever a managing director or other authorised agent knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorised agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. *If the plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened*.

I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. (Emphasis added)

**[92]** May I say here that in as much as the servant is not a stranger, a shareholder is also not a stranger even if it be the alter ego of the first defendant and here in our present case the third defendant is not a shareholder let alone the alter ego of the first defendant.

**[93]** The case of *Imperial Oil Ltd v C&G Holdings Ltd* (1990) 62 DLR (4th) 261 is even more to the point and instructive. There the plaintiff sued the company for breaching a contract and sued two individual defendants who are

the shareholders and directors of the company for inducing the breach of contract (similar to the plaintiff's case here against the third defendant). The trial judge allowed the plaintiff's claim against the company but dismissed the claim against the individual defendants. The plaintiff appealed to the Court of Appeal against the dismissal of its claim against the individual defendants. The Court of Appeal in upholding the trial judge's decision held as follows at pp 264–266:

> *Where, in the opinion of a director, the interests of the company would best be served by breaking its contractual commitments, he or she is entitled, if not obligated, to cause the company to do so. The tortious act is not considered that of the individual director but of the company against whom the aggrieved party may seek remedy for breach. Therefore, the self same act knowingly and intentionally committed, which will expose a third party who was otherwise a stranger to the contract to liability for wrongful contractual interference, may not incur liability for a director of a company. Indeed it may well be undertaken in the exercise of the director's duty.*
>
> This dichotomy could be reconciled simply by holding actions of directors leading to rupture of their company's contractual obligations are justified and may not be considered as wrongful interference with contracts of others. The law, however, does not go that far and does not accord such wide latitude to directors of companies since it is generally accepted that a director can be liable for inducing a breach of the company's contract, albeit the parameters of such liability appear somewhat narrow (see *Said v Butt* [1920] 3 KB 497; *De Jetley Marks v Greenwood (Lord) and Others* [1936] 1 KBD 863; *Einhorn v Westmount Investments Ltd* (1970) 11 DLR (3rd) 509).
>
> In her forceful argument counsel for Imperial urged the conflict could be reconciled by according immunity to a director when his or her deliberate act was undertaken bona fide within the scope of his or her authority and the best interests of the company. She enlisted Said in support of this proposition. She maintained that the facts before the court demonstrated that Messrs Gardiner and Neville had not acted bona fide and laid emphasis upon the evidence of Imperial of the projected sales by C&G during the contemplated dealership. She also argued that these directors could not be said to be acting in the company's best interests when their actions deprived C&G of that benefit and enabled them to gain benefits individually from the subsequent contract with Petro-Canada.
>
> With respect, the evidence of projected sales does not demonstrate, in itself, that it may not have been in the best interest of C&G to repudiate the contract. One may not assume that projections by one party of returns to another from a specific contract will necessarily translate into benefits to the latter. However, even if one assumes for the purpose of this appeal that the two directors did not act bona fide, this still does not necessarily, as counsel maintained, render the directors liable for wrongful inducement.
>
> As noted counsel relied upon Said in support of her premise that lack of bona fides exposed directors to liability for wrongful inducement. While Said held that a director acting bona fide within the scope of his or her authority is not liable for procuring or inducing a breach of contract by the company whose affairs he or she directs, it did not hold that liability for wrongful inducement would be incurred

where a servant or director acted mala fide wholly outside the range of his or her powers or duties. In fact, as counsel candidly pointed out, McCardie J explicitly noted in Said at p 506 that he was abstaining from expressing any opinion as to the law relating to procurement of a breach of contract in such circumstances. The question, therefore, remains: in what circumstances is a director who is not acting bona fide in the company's best interests liable for inducing a breach of contract by the company?

In my opinion that liability cannot be absolute. *The obligation to act bona fide is a duty owed by the director to the company. The discharge or otherwise of this duty in itself is of no concern to third parties. To make the internal affairs of a company amenable to scrutiny of third parties and to require directors to justify their corporate actions to such persons in order to obtain immunity from personal suit for the company's default would extend the concept of piercing the corporate veil beyond the limits prescribed by law, erode the established concept of separate corporate status and impair the efficacity of the corporate entity. Even when a director has not acted bona fide, therefore, there must exist some factor additional to the knowledge upon which he or she acts to justify a finding of wrongful inducement.*

In summary, a finding that a director is liable for wrongfully inducing breach of contract by the company, whose affairs he or she is directing, will require more than knowledge by the director that legal rights of others will be violated by his or her actions in bringing about the corporate breach. *No presumption of intent can flow from that knowledge because of the director's concomitant obligation to the company. A director will be immune from liability for procuring the breach where he or she acts bona fide within the scope of his or her authority in the best interests of the company. When not so acting, the director does not attract automatic liability unless the circumstances show that his or her dominating concern was focused upon depriving the complainant of its contractual benefits.* (Emphasis added.)

**[94]** I agree with Mr Conrad Young that the cases of *Said* and *Imperial Oil* clearly put paid to the plaintiff's case against the third defendant. As is clear from those cases, for the tort of inducing a breach of contract to bite, the alleged inducer must necessarily be a 'stranger' to the contract alleged to have been broken as such.

**[95]** As rightly pointed out by Mr Conrad, in *Said*'s case the alleged inducer was the managing director of the contracting party alleged to be in breach (the theatre), and in *Imperial Oil*'s case the alleged inducers were the directors and shareholders of the contracting party in breach. In both cases the pleas were rejected, as the parties charged to be inducers were not 'strangers', both being the decision-makers, or in other words the controlling minds or alter egos, of the contracting parties alleged to have been in breach.

**[96]** So too here, where the plaintiff's case is that the third defendant is the controlling mind of the first defendant. I cannot agree more with Mr Conrad that this plea is simply unsustainable in law, for like was said in *Said*'s case if one

were to accept the plaintiff's case in this regard, then in every case of a breach of contract by a company the alleged defaulting company's directors, shareholders, parent/holding company and subsidiaries will ail automatically be liable and be enjoined as parties, and that simply cannot be, and is not the law!

**[97]** According to Miss Celine, the English courts have found that holding companies were in fact carrying on business through the agency of its subsidiary company where the activities of the subsidiary company are so closely controlled and directed by the parent company that the latter can be regarded as merely an agent conducting the parent companies business (see *Smith, Stone and Knight Ltd v Lord Mayor, Aldermen & Citizens of the City of Birmingham* [1939] 4 All ER 116). Whilst that may be so, its application must strictly be confined to the peculiar facts of the particular case and that the concept of agency does not co-exist together with the tort of inducement for breach of contract which by its definition and development has been confined to cases of a stranger outsider third party interference in the breach. To extend the concept of agency in company law to justify the tort of inducement for breach of contract by the companies' shareholder or ultimate holding company would be to go down a dangerous road that is productive of prodigious litigation such as to erode substantially and significantly the sanctity of separate legal entity concept that has stood sure and certain for more than a century.

**[98]** Miss Celine's initiative and industry led her to the case of *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436 which she said illustrated the tort of inducing or procuring breach of contract by a parent company. In *Stocznia Gdanska*'s case the buyers failed to pay instalments pursuant to contracts for the construction and acquisition of six reefer vessels by Stocznia Gdanska SA ('Shipbuilders'). The shipbuilders terminated the contracts and brought an action against the buyers for damages. A number of issues arose in relation to the entitlement of the shipbuilders to terminate those contracts, and the consequences of their termination. The shipbuilders advanced a claim that the buyers' parent company had induced the buyers to breach their contracts with the shipbuilders.

**[99]** At first instance, Thomas J found that the parent company had not committed the tort of inducement of breach of contract in its direct form on the basis that it had not directed the buyers to breach their contracts with the shipbuilders nor was the parent company liable in the tort of conspiracy. However, Thomas J did find that the parent company was liable to the yard for the indirect inducement by unlawful means and the 'unlawful means' consisted in its failure, in breach of its contract with the service company, to keep the buyers in funds in order to enable the buyers to meet their responsibilities to the shipbuilders.

**[100]** The English Court of Appeal refused to interfere with the finding of Thomas J that there had been no inducement by the parent company for the purposes of the direct form of the tort. However, this issue turned on a matter of pleading: the shipbuilders' pleaded case was that the parent company had issued an instruction to the buyers to break their contract but Thomas J found that no such instruction had been given. There did not appear to have been a 'submission that a mere request amounted to the requisite persuasion or inducement'. Nevertheless, it was common ground that the buyers could not undertake the contract without loan finance procured with the assistance of (the parent company)' In the circumstances, the question arising was whether a request to a subsidiary by a parent company to omit to act might amount to an inducement of breach of contract.

**[101]** In relation to the indirect form of the tort, the English Court of Appeal upheld the finding of Thomas J that the parent company had been in breach of its contract with the service company by failing to finance the buyers' contract with the yard. Thomas J had found that the parent company's breach of its contract with the service company was intended by the parent company to prevent the buyers performing their contracts with the yard and that that was the 'primary objective of the decision not to fund' and that the parent company, by its actions must 'have intended to injure the yard' even if that was not its 'predominant' intention. The English Court of Appeal upheld the finding of Thomas J and held that the requisite intent had been proved on the part of the parent company. Its actions were directed against the yard as well as its subsidiary. It did not want its subsidiary to fulfil its contract with the yard and this was sufficient to found a claim that the parent company was 'responsible in tort for the indirect inducement by unlawful means of (the buyers) breaches of contract with the yard'.

**[102]** Similarly, Miss Celine argued, in the instant claim by the plaintiff it is undeniable that prior to the acquisition of the first defendant, the first defendant could not undertake the project as it did not have the required skills, equipment and experience. Thus, the first defendant appointed the plaintiff to undertake the project. However, upon the acquisition, the first defendant now had the required skills, equipment and experience which are derived from Bionersis SA and/or the third defendant.

**[103]** The third defendant obviously contends that it is not the parent company or a shareholder of the first defendant. However, according to Miss Celine, what is important to bear in mind is the way in which the first defendant is managed and the third defendant's involvement in view of the fact both the first defendant and the third defendant are subsidiaries of Bionersis SA and Bionersis SA operates its business in the region through the third

defendant. It is within this context that the plaintiff claims that the third defendant had induced and procured the first defendant to break its contract with the plaintiff.

**[104]** As I have said before, so I say here again, that would be taking the argument too far. Merely because both the first defendant and the third defendant are subsidiaries of the second defendant, that by itself (and here there is no evidence of anything more than that) cannot be equated to a stranger outsider third party interference with the decision of the first defendant. The first defendant is a separate legal entity from its shareholders. At the risk of repeating what has already been said, unless there is fraud, and here there is none, the first defendant's decision with respect to the pre-contract engineering claims and the calling off of the negotiations with the plaintiff must be respected and regarded as its own decision consistent with the concept of separate legal entity within a corporate structure which may well subsume the separate subsidiaries to the bidding of the ultimate holding company in the second defendant. Prior consultation by the first defendant with the parent company (the second defendant) or even another subsidiary (whether wholly owned or otherwise) (the third defendant) does not derogate or diffuse the concept of separate legal entity so as to transform the decision of the first defendant to also become that of the third defendant under the tort of inducing a breach of contract.

**[105]** In the circumstance, the plaintiff's claim for the amount for pre-contract engineering works against the third defendant is dismissed with costs.

**[106]** Likewise I would also dismiss the plaintiff's claim for USD215,345.16 and its claim for damages for inducing or procuring breach of contract against the third defendant with costs.

PRONOUNCEMENT

**[107]** To recapitulate, I had allowed the plaintiff's claim against the first defendant only for the amount of pre-contract engineering works for RM264,330.50 together with interest at 5%pa from date of the writ to realisation with costs of RM50,000 to be paid by the first defendant to the plaintiff.

**[108]** I had dismissed the plaintiff's claim for pre-contract engineering works for RM264,330.50 against the third defendant also with costs of RM50,000 to be paid by the plaintiff to the third defendant.

**[109]** With respect to the plaintiff's claim for the USD215,345.16 being loss

of profit against both the first and the third defendants and a further claim for damages for inducing breach of contract, I had dismissed it for the reasons given above. I awarded costs of RM50,000 to the first defendant and another RM50,000 to third defendant, both to be paid by the plaintiff to the respective defendants.

*Claim allowed for RM264,330.50 only against first defendant with interest and costs and all other claims against first and third defendants dismissed with costs.*

Reported by Ashok Kumar